No. 4210

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In the United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD E. KING, Plaintiff in Error

vs.

UNITED STATES OF AMERICA, Defendant in Error

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

Honorable Jeremiah Neterer, Judge

Brief of the United States of America, Defendant in Error

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No. 4210

In the

United States Circuit Court of Appeals

For the Ninth Circuit

DELLA SAYERS, Plaintiff in Error

vs.

No. 4218

UNITED STATES OF AMERICA,

Defendant in Error

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

Honorable Jeremiah Neterer, Judge

Brief of the United States of America, Defendant in Error

STATEMENT OF THE CASE

An information was filed in this case charging plaintiff in error, Richard E. King, with the violation of the narcotic drugs import and export act,

on two counts; with the importation of opium on count I and with the buying, receiving and concealing of the same opium on count II; the defendant was found guilty on both counts.

The evidence on behalf of the government showed that police officers, John Majewski and C. Hawaldt, and one A. B. Hamer, a government agent, were in a city automobile in the City of Seattle about four o'clock in the morning on the 16th day of April, 1923; that the police officers were engaged in their nightly occupation of looking for prowlers; that they saw the car of the defendant approaching and stopped it and police officer Majewski went over to the defendant's car and after a brief conversation discovered some sacks in the tonneau of the defendant's car; that the defendant failed to satisfactorily account for the presence of the sacks or their contents in his car other than to say that he had been employed to haul the same to a certain destination where they would be redelivered to the parties who had engaged his services; that he further failed to satisfy the officer as to the course of his travel, having stated that he had come from West Seattle, when the officer noticed that he had come from the direction of the Fisher Flour Mills, which was reached by a branch road. The defend-

ant was then placed under arrest and taken to the police station and thereupon a careful search of the car by officer Majewski and agent Hamer revealed three sacks in the tonneau and two sacks under the hood of the automobile containing, in the aggregate, two hundred and eighty-eight five tael tins of opium prepared for smoking with an estimated value of twenty-one thousand six hundred ($21,600) dollars. There was found a spotlight, in the car, containing a red and a green light bulb in addition to the ordinary white bulb.

The testimony on behalf of the government further showed that government agent Hamer had received information which placed the defendant under suspicion and gave the agent reason to believe that a felony was being committed by the defendant.

On behalf of the defendant, evidence was introduced to show that he was engaged in the business of taxicab driver as an employee of his step-father; that at about midnight he received a message to call for passengers at the Seattle Hotel; that when he arrived at the hotel he found a Chinaman and a white man waiting for him; that he carried them over to West Seattle, where he arrived about one thirty a. m.; that he waited approximately two

hours for them to return and while doing so, fell asleep in his car; that he was awakened by them and told to take the packages, which they had placed in the car, to Pioneer Square and wait for them there; that he did not know any packages had been placed under the hood of his car; that he did not know the names of his passengers and did not consider the employment unusual or of such a nature as to arouse his suspisions.

ARGUMENT

A petition to suppress, and an amended petition to suppress, certain evidence were duly presented to the court and denied prior to the trial of the case. (Tr. 42.)

At the conclusion of the testimony a motion for a directed verdict was denied, the court saying: "There is testimony here that the search was made by the police officers of the city, and it is likewise testified that there was reason to believe that a felony was being committed. The motion is denied." (Tr. 60.)

The sole question before this court is, was the admission of certain evidence secured without a search warrant, error?

The defendant admits the possession of the opium but denies knowledge of its nature previous to his arrest.

That if no government agent had been present in the police car, clearly there could be no question as to the admissability of the evidence, has been frequently decided.

Riggs vs. U. S., 299 Fed. 273 (4 C. C. A.).

U. S. vs. O'Dowd, 273 Fed. 600.

U. S. vs. Burnside, 273 Fed. 603.

Youngblood vs. U. S., 266 Fed. 579 (8 C. C. A.).

Did the fact that a government agent was present in the police car when the defendant was stopped and arrested by the police officer, not knowing who defendant was, change the situation?

There is no evidence that the police were acting under the directions of the government agent, and on the contrary the police officer stopped the defendant's car the same as he would any other prowler.

It has been held that "the mere presence of the federal officer at the search and his participation at the instance of the state officer did not render evidence obtained by the search incompetent, even

if the warrant was invalid." (*Malacrouis vs. U. S.*, 299 Fed. 253, 255 (4 C. C. A.)

Thomas vs. U. S., 290 Fed. 133.

Elrod vs. Moss, 278 Fed. 123.

On the other hand, if the testimony were construed to show that the government agent, Hamer, was not only present but actually participated in the arrest and search, was it error to admit evidence so obtained?

The contention of the government is, and it was so decided by the court (Tr. 60), that there was testimony showing reason to believe that a felony was being committed at the time of the arrest. Counsel for the plaintiff in error argues that upon the discovery that a felony was being committed, the officer should have secured a search warrant.

Does it sound reasonable that the defendant should have been permitted to go on his way while a search warrant was being sought? What would be the chance of a conviction if such steps were ordinarally taken?

In cases of felony, arrest may be made without a warrant when the arresting officer has information or knowledge of fact reasonably calculated to induce a belief that a felony has been committed

and that the person thus arrested without a warrant is guilty of having committted it. This was the rule at common law which has been generally adopted.

It is the contention of the government that any private individual having reasonable belief that a felony is about to be committed may arrest without warrant in order to prevent the crime, or may arrest another when a felony is being or has been committed.

The defendant took the witness stand and admitted practically every material fact testified to by the government witnesses and sought to explain away his possession of the contraband. The jury heard the evidence and by their verdict showed that they did not believe his story. He now seeks to have their verdict reversed on the ground that certain incompetent evidence was admitted against him.

In the case of *Libera vs. U. S.*, 299 Fed. 300 (9 C. C. A.) at page 301, the court said: "Before the trial the plaintiff in error petitioned the court for the return of property seized under a search warrant, on the ground that the search was unauthorized and illegal and the search warrant was of doubtful validity because of a mistake in the name

of the street and in the name of the owner or occupant of the premises; but the plaintiff in error took the witness stand in his own behalf and admitted the possession of the still and the possession of the intoxicating liquor as charged. In short, he admitted every material fact testified to by the raiding officers and is now in no position to claim that incompetent testimony was admitted to establish facts testified to by himself."

It is submitted that the defendant's rights in this case were fully protected at every stage of the trial and that the evidence introduced against him was competent and clearly admissible; that the officers had the right to arrest defendant who was caught in the act of committing a felony; and that the petition of the plaintiff in error for a new trial should be denied.

Respectfully submitted,

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